No. 82-1780

Office-Supreme Court, U.S.
FILED
1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

BURLINGTON NORTHERN, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Deputy Solicitor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

ANN D. NACHBAR
Attorney

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the warrant authorizing the inspection of petitioner's business premises pursuant to the Occupational Safety and Health Act of 1970 was overbroad.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 9

Appendix A 1a

Appendix B 6a

TABLE OF AUTHORITIES

Cases:

Burkart Randall Division of Textron, Inc. v. *Marshall*, 625 F.2d 1313 ..... 6, 7, 8, 9

Donovan v. *Sarosota Concrete Co.*, 693 F.2d 1061 ..... 7, 8

Establishment Inspection of Gilbert & Bennett Manufacturing Co., In re, 589 F.2d 1335, cert. denied, 444 U.S. 884, aff'g 1977-1978 O. S. H. Dec. (CCH) para. 22,270 7

Hern Iron Works, Inc. v. *Donovan*, cert. denied, No. 81-2193 (Oct. 4, 1982) 6

J.R. Simplot Co. v. *OSHA*, cert. denied, 455 U.S. 939 6

Marshall v. *Barlow's Inc.*, 436 U.S. 307 8

Marshall v. *Central Mine Equipment Co.*, 608 F.2d 719 7

Marshall v. *North American Car Co.*, 626 F.2d 320 ..... 7, 8

Page

Cases—Continued:

Marshall v. *Seaward International, Inc.*, 644 F.2d 880, aff'g 510 F. Supp. 314 6

Whirlpool Corp. v. *Marshall*, 445 U.S. 1 9

Constitution, statute and regulation:

U.S. Const. Amend. IV 5, 7, 8

Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. V) 651 *et seq.* :

Section 8(a), 29 U.S.C. 657(a) 2

Section 8(f)(1), 29 U.S.C. 657(f)(1) 2, 3, 5, 7, 9

29 C.F.R. 1903.11(b) 3

Miscellaneous:

OSHA Instruction CPL 2.12A, [1978-1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 11,743 (Sept. 1, 1979) 3, 4

OSHA Instruction CPL 2.12B, 3 Empl. Safety & Health Guide (CCH) para. 12,451 (Feb. 1, 1982) 3

OSHA Instruction CPL 2.45, Interim Field Operations Manual (Sept. 15, 1980) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1780

BURLINGTON NORTHERN, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B7) is reported at 694 F.2d 1213. The opinion of the district court (Pet. App. A1-A11) is reported at 521 F.Supp. 99.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1982. A petition for rehearing was denied on January 24, 1983 (Pet. App. C1). The petition for a writ of certiorari was filed on April 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Burlington Northern, Inc., operates a freight car repair facility in Laurel, Montana. On June 24, 1980, a Burlington employee filed a formal complaint with the Occupational Safety and Health Administration ("OSHA") in which he alleged the existence of 36 occupational hazards at the company's Laurel facility (App. A,

infra, 1a-5a).[1] The complaint stated that approximately 300 employees were exposed to a variety of serious hazards throughout the "entire repair facility and yards," such as "[h]eating, cutting and welding through lead based paint with no respiratory protection," "[i]nadequate ventilation in the Car Shop, Coal Shop, and One Spot," and "contaminat[ion] with almost every substance that the railroad has ever transported" at the Rip Track, One Spot and Big Shop (*id.* at 2a-4a).

The allegations concerning lead exposure were corroborated by a June 5, 1980 company memorandum that expressly acknowledged that Burlington workers must be protected from inhaling lead fumes whenever they heat lead-based paint with a torch or welding equipment (see Pet. App. B3). Based on that information and his general finding that the complaining employee was "knowledg[e]able and credible" (App. B, *infra*, 10a), OSHA's Acting Area Director evaluated the employee complaint and determined that reasonable grounds supported certain of the most serious allegations (*id.* at 7a-9a): (1) lead and zinc exposure during welding, burning and cutting operations in the Big Shop, Coal Shop, One Spot Shop and Rip Track areas of the facility; (2) inadequate ventilation for welding operations in the Big Shop, Coal Shop and One Spot; and (3) inadequate respirator protection for employees in the Big Shop, Coal Shop, One Spot and Rip Track areas.

Accordingly, pursuant to Sections 8(a) and 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a) and 657(f)(1),[2] and the pertinent OSHA regulation

---

[1]The employee complaint is reproduced at App. A, *infra*, 1a-5a. The affidavit of the OSHA Acting Area Director is reproduced at App. B, *infra*, 6a-11a.

[2]Section 8(a), 29 U.S.C. 657(a), authorizes the Secretary of Labor "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area * * * where work is

and program directive,[3] the Secretary applied to the United States District Court for the District of Montana for a limited-scope warrant to verify those specific allegations

---

performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein * * *."

Section 8(f)(1), 29 U.S.C. 657(f)(1), provides that where an employee or employee representative believes "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists," he may "request an inspection" by presenting a signed, written notice to the Secretary "set[ting] forth with reasonable particularity the grounds for the notice * * *." If the Secretary then "determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative * * * in writing of such determination."

[3]The Secretary's regulation, 29 C.F.R. 1903.11(b), states that occupational safety and health inspections in response to formal employee complaints "shall not be limited to matters referred to in the complaint."

OSHA Instruction CPL 2.12A, [1978-1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 11,743, which went into effect September 1, 1979, provided that complaint inspections in high-hazard industries should generally extend to the entire facility, but should be limited to the scope of the complaint in low-hazard industries. CPL 2.12A was pertinently incorporated into OSHA Instruction CPL 2.45, OSHA's Interim Field Operations Manual, on September 15, 1980, and replaced by OSHA Instruction CPL 2.12B, 3 Empl. Safety & Health Guide (CCH) para. 12,451, on February 1, 1982. The latter directive, which is currently in effect, further limits the circumstances under which full-scope complaint inspections will be conducted. This new directive generally limits safety inspections to complaint matters unless the establishment itself has a higher-than-average lost workday injury rate and is a member of a high-rate industry. The inspection following a health complaint in a high-hazard industry normally is to extend to all areas where a potentially serious health problem may exist.

(Pet. App. F1-F5). The Secretary's application stated (*id.* at F4; emphasis added):[4]

> The sole purpose of the inspection and investigation shall be to determine whether said employer is furnishing employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm and is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act, *with respect to the specific conditions alleged in the employee request and determined by the Area Director to be supported by reasonable grounds.*

See also App. B, *infra*, 10a.

On December 3, 1980, a United States Magistrate issued a warrant authorizing an inspection of Burlington Northern's Laurel workplace (Pet. App. E1-E4). The third paragraph of the warrant states that the purpose of the inspection is to determine whether the employer is complying with the Act and with OSHA regulations with respect to the "specific conditions and locations" enumerated in the OSHA Acting Area Director's affidavit, *i.e.*, the Big Shop, the Coal Shop, the One Spot Shop, the Rip Track, and the respirator maintenance and storage areas (*id.* at E2-E3). These areas are to be inspected for exposure to toxic fumes and inadequate ventilation, and the respirators in the maintenance and storage areas are also to be checked for adequacy.

---

[4]In support of his application, the Secretary filed a transcription of the complaint, a copy of the Burlington memorandum discussing the need to protect the workers from excessive lead exposure, a copy of the Secretary's administrative guidelines for evaluating such complaints (CPL 2.12A), an affidavit by the complaining employee, and an affidavit by the OSHA Acting Area Director explaining why he had credited portions of the complaint.

Burlington Northern refused to honor the warrant, and the Secretary petitioned the district court to hold the company in civil contempt. The company opposed the petition and moved to quash the warrant as overbroad because it allegedly authorized a search beyond the scope of the complaint. The district court granted petitioner's motion to quash the warrant (Pet. App. A1-A11). In so doing, the court rejected the Secretary's contention that the warrant by its terms limited the inspection to the areas about which the employee had complained; instead, focusing on only the first and second (but not the third) paragraphs of the warrant, the court determined that the warrant authorized a full-scope inspection of the Laurel facility (*id.* at A9). The court ruled that under both Section 8(f)(1) of the Act and the Fourth Amendment, the scope of an inspection conducted pursuant to an employee complaint must be tailored to the scope of the complaint (Pet. App. A8-A10). Accordingly, the court concluded that the "scope of subsequent warrants issued pursuant to the complaint in this case must be limited to inspections of the primary areas complained of, the One Spot, Rip Track and Coal Shop stations" (*id.* at A11).

2. The court of appeals reversed (Pet. App. B1-B7). The court first noted that the warrant application had been filed in response to an employee complaint that "was properly handled as part of a valid inspection program designed to protect commercial property owners from the unbridled discretion of administrative officers" (*id.* at B5). Second, the court found that "the application alleged ventilation defects so that the magistrate could have reasonably believed that the inspection of the entire premises was necessary to detect ventilation hazards" (*id.* at B6). It pointed out that there was no information before the magistrate indicating that the facility was too large for a full-scale inspection to be reasonable, nor was there evidence suggesting that OSHA had acted in bad faith in obtaining a broad

warrant (*id.* at B5, B6). Third, the court stated that the scope of the search for documents "was carefully delineated to conform to the purpose of the search and was not overbroad" (*id.* at B7). Finally, the court found "no extraordinary circumstances" here to exempt Burlington Northern from the general rule allowing the scope of OSHA inspections to exceed the scope of underlying employee complaints (*ibid.*).

ARGUMENT

Petitioner urges the Court to grant review in this case in order to determine whether an OSHA warrant based on an employee complaint must restrict the inspection to those areas of the worksite mentioned in the employee complaint. We note that on two recent occasions, the Court has declined review in cases presenting this issue. See *Hern Iron Works, Inc.* v. *Donovan*, cert. denied, No. 81-2193 (Oct. 4, 1982); *J.R. Simplot Co.* v. *OSHA*, cert. denied, 455 U.S. 939 (1982). There is no need even to consider that question here, however, because the OSHA warrant at issue is in fact a limited-scope warrant. Moreover, given the nature of the allegations in the employee complaint, the magistrate would have been justified in issuing a full-scope warrant. Accordingly, this case does not warrant further review.

1. The scope of the instant warrant would have been upheld even by those courts of appeals that do not agree with the Ninth Circuit that full-scope complaint inspections are proper as a matter of law.[5] First, careful examination of

---

[5]Five other courts of appeals have considered the scope of inspection issue. In an unpublished opinion, the Fourth Circuit affirmed a district court decision holding that full-scope warrants founded on employee complaints are constitutionally permissible. *Marshall* v. *Seaward International, Inc.*, 644 F.2d 880 (1981), aff'g 510 F. Supp. 314 (W.D. Va. 1980). The Seventh Circuit, in *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313 (1980), upheld a full-scope warrant based on an employee complaint; however, because each of the three judges on the panel wrote a separate opinion, there was no opinion

the third paragraph of the warrant shows that the inspection authorized by the magistrate is in fact limited in scope. Under the express terms of the warrant, the Secretary is to confine his inquiry to the "Big Shop," the "Coal Shop," the "One Spot," the "Rip Track" and "locations where [respirators] are stored, maintained and cleaned" (Pet. App. E2-E3). These are the particular work areas that must be inspected in order to verify the allegations in the complaint that the Secretary credited (*id.* at F-4; App. B, *infra*, 7a-9a).[6]

---

for the court on the question presented here. The Seventh Circuit had previously upheld a full-scope warrant over objection that the inspection should be limited in scope to the substance of the complaint. *In re Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, cert. denied, 444 U.S. 884 (1979), aff'g 1977-1978 O. S. H. Dec. (CCH) para. 22,270 (N.D. Ill. 1977). See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra*, 625 F.2d at 1324-1325 n.18.

On the other hand, the Third Circuit, in *Marshall* v. *North American Car Co.*, 626 F.2d 320 (1980), held as a matter of statutory construction that the scope of OSHA inspections conducted under 29 U.S.C. 657(f)(1) pursuant to an employee complaint must bear an appropriate relationship to the violations alleged in the complaint. The Eleventh Circuit, in *Donovan* v. *Sarasota Concrete Co.*, 693 F.2d 1061 (1982), held that the Fourth Amendment requires limited scope inspections, and the Eighth Circuit, in dictum, commented to the same effect. *Marshall* v. *Central Mine Equipment Co.*, 608 F.2d 719 (1979).

[6]The district court held that OSHA is entitled to gain entry only into "the primary areas complained of," which the court described as the One Spot, Rip Track, and Coal Shop (Pet. App. A11). The warrant authorizes entry into those areas and two additional locations, the Big Shop and the respirator storage and maintenance areas. The employee's complaint mentions the Big Shop at least as often and as prominently as the other areas into which the district court agreed that entry is permissible. Furthermore, it is clear that the Secretary must have access to the respirator storage and maintenance areas in order to verify the complaint concerning inadequate respirators. Thus, the locations to which the warrant authorizes OSHA inspectors to be admitted correspond precisely to the scope of the employee complaint.

Second, the magistrate would have been justified in authorizing a full-scope search because the hazardous conditions reported in the complaint are "sufficiently diffuse to sustain [a] determination that a search of the entire workplace [is] reasonable." *Burkart Randall Division of Textron, Inc.* v. *Marshall,* 625 F.2d 1313, 1326 (7th Cir. 1980) (Fairchild, C.J., concurring). As the court of appeals concluded (Pet. App. B6-B7), because one of the alleged violations is inadequate ventilation, it is reasonable to infer that inspection of the entire facility would be necessary. In these circumstances, a warrant authorizing a search of petitioner's entire workplace would bear a reasonable relationship to the nature of the hazards alleged (see *Donovan* v. *Sarasota Concrete Co.,* 693 F.2d 1061 (11th Cir. 1982); *Marshall* v. *North American Car Co.,* 626 F.2d 320, 324 (3d Cir. 1980)), and thus would be proper under any of the tests set forth by the courts of appeals that have considered the scope of inspection issue.

2. Although review is not warranted in this case, we submit that full-scope inspections based on employee complaints are consistent with both the Fourth Amendment and the Occupational Safety and Health Act. Because such inspections are governed by reasonable administrative standards and must be approved by a neutral magistrate, there is no danger that the decision whether to conduct a full-scope search will be left to the unbridled discretion of the officers in the field. See *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 323 (1978). Moreover, if full-scope inspections are proper when conducted pursuant to general administrative plans — where there is no specific basis for suspecting that the conditions at a particular facility are in violation of the Act — then it is reasonable to conclude that full-scope inspections should also be permissible where there is probable cause to believe that a violation exists at a particular establishment. See *Burkart Randall Division of Textron,*

Inc. v. *Marshall, supra,* 625 F.2d at 1323-1326 (opinion of Sprecher, J.). That is especially so since, under OSHA's current program directive permits safety inspections (which constitute the vast majority of inspections) to be full-scope in response to a specific complaint only when the establishment itself has a higher-than-average injury rate and is part of a high-hazard industry. See note 3, *supra.* Finally, Section 8(f)(1) of the Act is a description of the circumstances under which the Secretary *must* conduct an inspection. Thus, the section is essentially an employee rights provision (see *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 16 & n.25 (1980)), not a limitation on the Secretary's authority to inspect. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* 625 F.2d at 1326 (opinion of Sprecher, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Deputy Solicitor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

ANN D. NACHBAR
Attorney
Department of Labor

JUNE 1983

DOJ-1983-06

APPENDIX A

Occupational Safety and Health Administration Complaint

U.S. Department of Labor

The undersigned (check one)

[X] Employee [ ] Representative of Employees

[ ] Other (*specify*) _____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

Employer's Name

Burlington Northern

Employer's Address (Street) *(City)*

Railroad Street Laurel,

(State) *(Zip Code)* *Telephone*

Montana 59044 628-6259

---

1. Kind of business

Freight car repair

---

2. Specify the particular building or worksite where the alleged violation is located, including address.

The entire repair facility and yards at Laurel, Montana.

---

3. Specify the name and phone number of employer's agent(s) in charge.

Mr. R. L. Bowers 628-6259

---

4. *Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.*

About 300 workers are exposed to all the articles listed below:

1. Heating, cutting and welding through lead based paint with no respiratory protection.
2. Heating, cutting, and welding on galvanized metal with no respiratory protection.
3. Refusal to supply proper respiratory protection.
4. Cutting and welding over contaminated ground resulting in the inhalation of toxic smoke and fumes.
5. Exposure of workers to contaminated ground.
6. Failure to clean up contamination.
7. Failure to inform workers of the contents of cars that they are working on.
8. Insufficient work space between cars on rip track.
9. Inadequate blocking of cars on rip track.
10. Lifting more than maximum capacity with jacks on rip track
11. No protection from falling ice on buildings.
12. Inadequate snow removal.

13. Moving cars on tracks where men are working.

14. Poor placement of fire extinguishers.

15. Falsifying tags on fire extinguishers.

16. Storage of oxygen and gas bottles too close together.

17. Burning and welding on LP gas cars and all other types of dangerous tank and freight cars.

18. Lifting more than maximum capacity with cranes and fork trucks and hoists.

19. Lifting more than maximum capacity of cranes that have frayed cables and slings.

20. The use of cables, chains and slings far beyond their capacities.

21. Moving cars by hand, in and out of shops.

22. Jack stands that are in extremely dangerous condition.

23. Men working overhead without having the area roped off.

24. Fire damage that has not been repaired in over 2 years.

25. Burlington Northern will supply their men only with dust respirators and has no type of protection from any type of fumes or vapors.

26. Inadequate ventilation in the Car Shop, Coal Shop, and One Spot. The Wood Shop has ventilation equipment but it has been out of operation for almost three years.

27. Inadequate preventitive maintenance program. This company will only fix something when it breaks down or causes injury to an employee.

28. No reverse warning devices on much of the equipment.

29. Burning of grease and slug from cars with ox-ax torches and no respiratory equipment provided.

30. Work areas on the rip track, One Spot yards, and Big Shop are contaminated with almost every substance that the railroad has ever transported.

31. Hoses, lines and parts are scattered in disarray on the floor of the Big Shop and Coal Shop.

32. Huck guns and hoses in poor repair, leaking, and the possibility of injection of hydraulic fluid under skin.

33. Exposed electrodes and wires on welders.

34. Failure to correct articles brought up at safety meetings.

35. Burlington Northern does not comply with their own safety rules.

36. Working on trains with no blue flag protection.

5. (a) *To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Government agency?*

Yes [ ] No [x]

5. (b) *If yes, and you know, which Government agency?*

6. *Has this condition been brought to the attention of the employer?*

Yes [x] No [ ] Don't know [ ]

7. *Please indicate your desire:*

[x] I **do not** *want my name revealed to the employer*

[ ] My name **may be** *revealed to the employer*

NOTE: It is unlawful to make any false statement, representation or certification in any document filed pursuant to the Occupational Safety and Health Act of 1970. Violations can be punished by a fine of not more than $10,000, or by imprisonment of not more than six months, or by both. (Section 17(g))

Signature /s/ Daniel W. Wobig *Date* June 24, 1980

Typed or Printed Name Daniel W. Wobig

Address (Street) 305 W. 1st St. *(City)* Laurel,

(State) Mt. (Zip Code) 59044 Telephone 628-7811

*If you are an authorized representative of*_____

*employees affected by this complaint, please*_____

*state the name of your organization and your title*_____

APPENDIX B

State of Montana)
) ss.
County of Yellowstone)

AFFIDAVIT OF DAVID J. DiTOMMASO

I, DAVID J. DiTOMMASO, being first duly sworn, hereby state as follows:

1. I am Acting Area Director for the Occupational Safety and Health Administration, United States Department of Labor. As Acting Area Director I am responsible for the Billings Area Office of said agency and for enforcement of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*) in the State of Montana.

2. Section 8(a) of said Act and 29 C.F.R. 1903.3 authorize Compliance Safety and Health Officers of the Department of Labor to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any employee, owner, operator, agent or employer; and to review records required by the Act and regulations, and other records which are directly related to the purpose of the inspection.

3. Under 29 C.F.R. 1903.4, upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment, or where such a refusal may be anticipated, the Area Director shall consult with the

Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary. Under 29 C.F.R. 1903.4(d) the term "compulsory process" includes *ex parte* application for an inspection warrant or its equivalent.

4. On June 24, 1980, I received the Occupational Safety and Health Complaint attached to the affidavit of Daniel W. Wobig, submitted herewith, which alleges the existence of certain specified hazards to an establishment identified as:

> Burlington Northern Incorporated
> Railroad Maintenance and Repair Facility
> Laurel, Montana

and requests inspection thereof by the Occupational Safety and Health Administration pursuant to Section 8(f) of the Act.

5. In reviewing the allegations of the said complaint and additional information furnished by the complainant and evaluating them in accordance with administrative guidelines set forth in OSHA Instruction CPL 2.12A, a copy of which is attached hereto, I have determined that there are reasonable grounds to believe that violations of applicable occupational safety and health standards exist with respect to the following conditions and areas of the facility:

> (a) *Welding, cutting and burning operations conducted in the Big Shop, Coal Shop, One Stop and Rip Track areas of the said facility.* The complainant states that regular employee exposure to toxic lead fume exists when employees weld, cut and burn on railroad cars that are painted with leaded paints. This is corroborated by a Burlington Northern document attached to his affidavit as Exhibit B. The applicable standard, 29 CFR 1910. 1025, prohibits lead exposure

above specified levels, requires regular exposure monitoring and medical surveillance by the employer, and specifies particular types of mandatory respirator protection, none of which have been observed. It has been my experience that allowable levels for lead fume exposure are quickly exceeded in circumstances similar to those alleged by the complainant. This exposure is occuring regularly to seventy or more employees in the areas mentioned and occurs on a daily basis according to the information furnished by the complainant. Lead exposure can result in both chronic or acute health effects. According to the complainant, he is aware of no employees who suffered acute effects but there is a significant danger that prolonged exposure could cause serious, irreversible damage to certain organ systems including the central nervous system and the kidneys.

In that some welding is performed on galvanized metals, there is a similar hazard presented from zinc fume exposure. Zinc fume exposure is regulated by 29 CFR 1910.1000, which standard sets precise limits for exposure levels, requires specified respirator protection and reduction of exposure through engineering or administrative measures. Zinc fume above the allowable levels is very likely to occur in connection with such welding operations.

(b) *Adequacy of ventilation for welding operations as required by 29 CFR 1910.252 in the Big Shop, Coal Shop and One Spot buildings.*

The welding standard, 29 CFR 1910.252, contains specific ventilation requirements for indoor welding operations in terms of flow rate and volume, as well as specific detailed requirements for ventilating welding operations involving exposure to lead fume. Lead

fume exposure from welding has been substantiated in the above areas and the complainant states that mechanical ventiliation is only provided in one of the three shops. According to the complainant, this ventilation has not been functioning properly. There are therefore reasonable grounds to conclude that violations of the welding standard exist. Inadequate ventilation would substantially increase and prolong welding fume and lead fume exposure to employees in these areas and would likely cause such exposure to employees other than the welders themselves.

(c) *Adequacy of respiratory protection furnished to workers in the Big Shop, Coal Shop, One Spot and Rip Track areas.*

The lead standard, 29 CFR 1910.1025 and the zinc fume standard, 29 CFR 1910.1000, both specify appropriate respirator protection for workers exposed to these substances. In addition, the general respirator standard, 29 CFR 1910.134, requires the use of respirators which are applicable and suitable to the hazard. The AO R90N filter described by the complainant is suitable only for dust exposures and is not suitable for the lead and zinc fume exposure apparent here.

The respirator standard, 29 CFR 1910.134, also requires the selection and use of such respirators pursuant to a detailed written respirator program to insure that they are properly selected, used, maintained and furnished to workers. In that, according to the complainant, respirators are seldom used and only an inappropriate respirator is furnished, there are reasonable grounds to conclude that violations of 29 CFR 1910.134 exist. Such violations would appear to affect the majority of the persons in the three shop areas who do welding, cutting and burning.

6. In obtaining information from the complainant, Daniel W. Wobig, upon which I based my evaluation of the above conditions, I have found him to be knowledgable [*sic*] and credible as to his description of the working conditions. His allegations concerning lead-based paints are corroborated by the Burlington Northern document referred to above. In addition, in signing the complaint attached to his affidavit, Mr. Wobig recognized that any false statement or representation therein would subject him to criminal penalties.

7. Burlington Northern Incorporated has followed a consistent policy of refusing to permit inspection of its premises by the Occupational Safety and Health Administration and therefore it may be reasonably anticipated that the company will not permit inspection of its Laurel, Montana facility absent an inspection warrant. Most recently, representatives of my office, including myself, have been refused permission to inspect Burlington Northern facilities at Havre, Montana, on January 31, 1980, and at Missoula, Montana, on May 28, 1980.

8. If authorized by the Court, the inspection sought herein will be conducted by Compliance Safety and Health Officers who are authorized to conduct such inspections by the Assistant Secretary of Labor.

9. Said inspection will be conducted in accordance with the limitations as to time, manner and scope set out in paragraph 2. The sole purpose of said inspection will be to determine the status of compliance of Burlington Northern with the Occupational Safety and Health Act and applicable regulations promulgated thereunder with respect to the specific conditions stated above. Civil citations requiring the correction of any observed violations may be issued and civil penalties may be proposed. No evidence of criminal conduct is being sought.

10. Said inspection should take no more than three working days to complete and will be commenced as soon as is practicable after the issuance of an inspection warrant.

David J. DiTommaso
Acting Area Director

Subscribed and sworn to before me this _____ day of December, 1980.

United States Magistrate